



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

DILLON & YUDELL LLP
8911 NORTH CAPITAL OF TEXAS HWY
SUITE 2110
AUSTIN TX 78759

COPY MAILED

APR 26 2006

OFFICE OF PETITIONS

ON PETITION

In re Application of :
Arendt, et al. :
Application No. 10/042,412 :
Filed: January 7, 2002 :
Attorney Docket No. AUS919970761US2 :
For: HIGHLY SCALABLE AND HIGHLY :
AVAILABLE CLUSTER SYSTEM :
MANAGEMENT SCHEME :

This is a decision on the petition under 37 CFR 1.137(a), filed April 12, 2006, to revive the above-identified application. The petition will be treated under 37 CFR 1.181 as a petition to withdraw the holding of abandonment.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

The petition under 37 CFR 1.181 is **DISMISSED**.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The Office contends that the above-identified application became abandoned for failure to submit a reply to the July 13, 2005 non-final Office action which set an extendable three month period for reply. No reply being received, the Office considered this application abandoned on October 14, 2005. A Notice of Abandonment was mailed on April 6, 2006.

Petitioners allege that the July 13, 2005 non-final Office action was not received.

The showing required to establish non-receipt of an Office communication must include:

1. A statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received.

2. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.¹

A review of the record indicates no irregularity in the mailing of the July 13, 2005 non-final Office action, and in the absence of any irregularity there is a strong presumption that the communication was properly mailed to the applicants at the correspondence address of record. This presumption may be overcome by a showing that the aforementioned communication was not in fact received.

The showing in the instant petition is not sufficient to withdraw the holding of abandonment because practitioner did not include a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed.

In short, petitioners have not provided adequate evidence of non-receipt. The petition is dismissed.

It is noted that practitioner asserts the Office action in question is, on its face, defective. If this is in fact the case, then requiring petitioners to file a response to it as a component of a petition to revive would be a waste of petitioners' time and efforts. Therefore, the petition will be treated only under 37 CFR 1.181, so that when petitioners file a grantable reconsideration petition, the Office can mail a replacement Office action with a new period for response. The examiner will determine the contents of the new Office action.

No petition fee was charged in connection with this matter.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITION
Commissioner for Patents
Post Office Box 1450
Alexandria, VA 22313-1450

By hand: U.S. Patent and Trademark Office
Customer Service Window, Mail Stop Petition
Randolph Building
401 Dulany Street
Alexandria, VA 22314

By FAX: (571) 273-8300 - ATTN: Office of Petitions

¹ See notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

Telephone inquiries may be directed to the undersigned at (571) 272-3230.

A handwritten signature in black ink, appearing to read "E. Shirene Willis". The signature is written in a cursive, flowing style.

E. Shirene Willis
Senior Petitions Attorney
Office of Petitions